1846

No. 153.

Petition for Rehearing.

OFFICE SUPREME COURT of U. S.
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IN THE

Supreme Court of the United States.

H. L. Bedford and Lou M. Bedford,

vs.

The Eastern Building and Loan Association of Syracuse, N. Y.

No. 153, October Term, 1900.

The Petition of H. L. Bedford and Lou M. Bedford.

ROBERT M. HEATH,
Attorney for H. L. Bedford and Lou M. Bedford.

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To the Honorable the Justices of the Supreme Court of the United States:

H. L. Bedford and Lou M. Bedford, the appellants in this cause, respectfully present this their petition for a rehearing of this cause, and submit the following reasons why their prayer should be granted:

1. Among the questions involved in this cause was one as to the validity of certain contracts; the claim being

that The Eastern Building and Loan Association was doing business in Tennessee in 1891, not having complied with the terms of various laws of that State and that such contracts were therefore void. In the decision of the cause the Supreme Court of the United States in the opinion rendered by Mr. Justice McKenna referred to H. L. Bedford's written application for a loan as of date March 20th, 1891, and said, "the statutes of Tennessee relied on as a "defense was passed March 26, 1891, and to repeat the "question is, did the subscription to the stock of the asso-"ciation, its issuance and the application for a loan in pur-"suance of it constitute a contract which was inviolable by "the State Legislature? We think the answer should be "in the affirmative."

The Court in such opinion, referring to the right or privilege of a stockholder of the association borrowing, said: "The condition of a loan existing—means, in the "treasury, a tender of good security—the contingent right "became a vested one, a contract was formed, and can "there be a doubt that it was enforceable against the as-"sociation? If it could have been enforced by suit it was "properly yielded to without suit and possessed all legal "sanctions"

The ground of the opinion and decision rendered was that H. L Bedford elected to borrow on March 20th, 1891, and there then being "means in the treasury" and "a tender of good security" his privilege of borrowing was, at the date, March 20th, 1891, a vested right which could

not be impaired by the passage of the subsequent laws of March 26th, 1891.

Petitioners respectfully represent that in rendering its decision the Court overlooked the fact that the legislature of the State of Tennessee on March 10th, 1891, passed an Act which was approved March 17th, 1891, and which took effect from its passage. The Eastern Building & Loan Association had not complied with the terms of the Act just mentioned, which is chapter 95 of the Acts of 1891. Petitioners submit to the Court that at the time this Act, chapter 95, went into effect H. L. Bedford had no vested right, or fixed right of any kind to a loan of the Eastern Building & Loan Association, and that the effect of the Act, chapter 95, was to prohibit The Eastern Building & Loan Association from carrying on business in Tennessee and making loans to its citizens when the terms of that Act had not been complied with by it. Petitioners submit to the Court that H. L Bedford had no right to any loan of any kind until he elected to ask for it, and that he could not so elect after the passage of the Act, chapter 95, and thereby enable The Eastern Building & Loan Association to carry on business in Tennessee, and to make loans therein when the terms of that law had not been complied with.

In the 11th American and English Encyclopedia of Law (2nd edition), at page 120, it is said: "The right to prop-"erty acquired by an election dates from the election and "does not come into existence until the election is actually

"made. As a consequence it has been held that a con-
"veyance by quit claim before election did not convey a
"title subsequently acquired by election"

See also Hamilton vs. O'neil, 9 Mo. 11.
Welch vs. Anderson, 28 Mo. 298.
Branford vs. Wolf, 103 Mo. 391.
U. S. vs. Grundy, 2 Crauch 337.

In Allgeyer vs. Louisiana, 165 U. S. 587, it is said, "the 14th amendment, however, does not guarantee the "citizen the right to make, within his state, either direct-"ly or indirectly, a contract, the making whereof is con-"stitutionally forbidden by the State."

See also Hooper vs. California, 155 U. S. 656.

Petitioners submit that prior to an actual application for a loan, a stockholder's interest would be a mere possibility that a loan might be applied for at some time, and such a possibility, uncertain as to time and amount, and which might never arise, could not prevent the operation of such an act as chapter 95 of the Acts of 1891, hereinbefore mentioned.

See Clarke vs. McCrary, 12 S. & M. (Miss.) 347.
Price vs Sessions, 3 How. (U. S.) 635.
Allen vs. Hawks, 136 U S,, 301.
Randall vs. Kruger, 23 Wall, 148.
Stephens vs. Cherokee Nation 174 U. S , 478.
Taylor vs. Taylor, 12 Lea (Tenn.), 496.

Contingent remainders may be defeated by statute.

Peoples L. & E. Bank vs. Garlington, 32 S. E. Rep. (S. C), 513.

In Hamilton Gas Light Co. vs. Hamilton, 146 U. S., 268, the Court said, "Nor does every statute which affects "the value of a contract impair its obligation. It is one "of the contingencies to which the parties look now in "making a large class of contracts that they may be affect-"ed in many ways by State and National legislation."

A State law "may be retrospective in its character "and may divest vested rights and yet not violate the "Constitution of the United States unless it also impairs "the obligation of a contract."

Charles River Bridge vs. Warren Bridge, 11 Peters, 539.

Satterlee vs. Matthewson, 2 Peters, 413.

Laws often rerder performance of contracts illegal which were legal when made and prevent performance thereof.

Odlin vs. Ins. Co , 2 Wash., C. C., 312.

Rogers vs. Hoyt, 4 Vt., 172.

Fitzgerald vs. R. R., 13 L. R. A., 70 (Vt.).

Bradford vs. Jenkins, 41 Miss., 336.

Dermott vs. Jones, 2 Wall, 7.

Saunner vs. Ins. Co. 41 Mo. App., 480

Brick & Church vs. City, 5 Cowen, 538.

Hamilton vs, City of Hamilton, 146 U. S., 258.

This principle applies more strongly, of course, when no attempt had been made to form the contract until after the passage of the law.

The decision in the present case was based on the idea that H. L. Bedford could have forced the Eastern Building and Loan Association, by suit, to have made him a loan, and that the Association simply yielded to what it could have been forced to do. Petitioners submit that H. L. Bedford never having applied for any loan prior to the passage of the Act, chapter 95, before mentioned, had no right which he could have asserted against the Association. After the passage of such act he and the other Tennessee stockholders in such Association, who had not previously applied for loans, could not as citizens and residents of Tennessee by applying therefor enable such Association to carry on business in Tennessee, when it had not complied with the terms of the Tennessee laws. Upon such applications being made after the passage of such laws, the Association had the right and power to refuse the same, and should have done so or complied with the State laws.

It cannot be doubted that the Eastern Building and Loan Association was doing bnsiness in Tennessee at the time of the transactions in question. It said so itself in its bill (Transcript, p. 1), and had its agents and agencies therein. It is submitted that such Association, when the Act, chapter 95, fixed the terms upon which such

business could be carried on, could not disregard such Act and carry on its loan business thereafter in Tennessee. When Tennessee stockholders had not previously asked for loans they could not by asking therefor after such Act enable the Association to disregard the law.

The Association was carrying on business in Tennessee, although it only loaned to old stockholders and may not have sold stock after the passage of such laws.

Connecticut, &c., Ins. Co. vs. Spratly. 172 U. S. 602.

See also the Tennessee cases cited in original brief on behalf of Bedford and wife, at pages 41, 42, 43 and 44 thereof.

Petitioners, H L. Bedford and wife, in their answer relied, as a defence, upon the following acts of the legislatue of the State of Tennessee, viz:

Chapter 31 of 1877, passed March 19, 1877 and approved March 21, 1877. Chapter 95 of 1891, passed March 10, 1891 and approved March 17, 1891. Chapter 122 of 1891, passed March 21 1891 and approved March 26, 1891. and Chapter 2 of 1891, passed March 26, 1891 and approved March 28, 1991. All of these Acts are copied in the appendix to the original brief on behalf of Bedford and wife. Bedford and wife also relied upon all of these Acts in the assignments of error filed in the United States Circuit Court of Appeals. See Transcript pages 14, 15, (17, 18,19,) 116, 117.

The original brief filed on behalf of Bedford and wife in the Supreme Court of the United States in the assignments of error therein (page 15) also relied on all the Acts of Tennessee hereinbefore mentioned.

The Act, Chapter 31 of 1877, by Section 2 thereof, provided that foreign corporations affected thereby "desiring to carry on its business in the State must first file "in the office of the Secretary of State a copy of its charter" and "cause an abstract of the same to be recorded in "the office of the register of each county in which such "corporation proposes to carry on its business or to acquire any land "

Section 7 of this Act, Chapter 31 of 1877, provides all charters so to be filed as to "such parts thereof as may be "found to be in conflict with the laws of the State shall "be null and void."

The Act, chapter 95, of 1891, took effect from its passage, and extended the Act, chapter 31, of 1877, to foreign Building and Loan Associations. The Act, chapter 122, of 1891, extended the Act, chapter 31, of 1877, to all foreign Corporations. Under each of these Acts, chapter 31, of 1877, chapter 95, of 1891, and chapter 122, of 1891, the Eastern Building and Loan Association was obliged to file its charter with the Secretary of State and to register abstracts thereof in the different counties. Such charter was not filed with the Secretary of State until August 11, 1893, and no registration was had until August 15, 1893.

The Supreme Court of Tennessee, as shown in the brief filed on behalf of Bedford and wife upon the hearing of this cause in Supreme Court of United States, has repeatedly held that when the charters of foreign corporations were not filed with the Secretary of State and abstracts thereof registered in the different counties in Tennessee where business was carried on, that contracts were absolutely void.

See authorities referred to in that brief, at pages 39 to 44.

See especially, Myers Mfg. Co. vs. Wetzel, 35 S. W. Rep. 896.

Cumberland Co. vs. Canter, 35 S. W. Rep. 888.

N. H. Ins. Co. vs Kennedy, 36 S. W. Rep. 710 (96 Tenn. 711).

Lumber Co. vs. Thomas, 92 Tenn. 595.

The said brief, at the same pages referred to cases decided by the Supreme Court of Tennessee long prior to statutes in question, which plainly indicated what the construction of such statutes would be by the Tennessee Supreme Court. These decisions began as far back as 1843 and numbers of them were made before The Eastern Building and Loan Association transacted any business of any kind in Tennessee. The said brief, on page 40, further referred to authorities showing that the filing of the charter with the Secretary of State and registration of abstract thereof in 1893, did not validate the illegel contracts made in 1891.

The Act, chapter 95, of 1891 imposed the same terms upon foreign corporations as the Act, chapter 122, of 1891 did, and it was just as necessary to comply with the terms under one Act as under the other.

In the additional brief filed in the Supreme Court of the United States on behalf of Bedford and wife on the hearing the attention of the Court was called to the case of Young vs. S. T. I. Co. 85 Tennessee, Reports 198, decided by the Tennessee Supreme Court in 1886. This decision construed the Act, chapter 31, of 1877 of Tennessee requiring charters of foreign corporations to be filed with the Secretary of State and abstract thereof to be registered. The Supreme Court of Tennessee in such case (85 Tenn., 198) held that foreign corporations could not carry on business in Tennessee "except upon compliance with this "Act and upon the terms of this Act." This decision, made in 1886, of course applied to the Act, chapter 95, of 1891 as soon as passed, or such Act was simply an extention of chapter 31 of 1877. When the Act, chapter 95, of 1891 went into effect, it is submitted, no contract of any kind existed between Bedford and the association as to a loan, as he had made no application for any, and might never have done so. Bedford could not have forced the association to continue business in Tennessee after the passage of the Act, Chapter 95 of 1891. It did so voluntarily without complying with the law. It kept up its agencies in Tennessee and made loans through such agencies and declined to make them except in that manner.

(See original brief for Bedford on the hearing, pages 6, 7,8.) If the stockholders in Tennessee had any privilege of borrowing after the passage of the Tennessee law, such privileges could only have been claimed in New York, the situs of the Eastern Building & Loan Association, and not in Tennessee and as part of aud in connection with the forbidden business in Tennessee. The association should have left the State of Tennessee, remained at home, discharged its agents in Tennessee and ceased business in Tennessee or complied with the Tennessee law. Stockholders in Tennessee should have been compelled to go to the association in New York if they desired to borrow. After the passage of the law the association had no right to go to or remain in Tennessee and to make the contingent right of the Tennesse stockholders a pretext for carrying on the illegal business of loaning money in Tennessee.

It appeared distinctly that the Eastern Building and Loan Association after the passage of the Tennessee laws of 1891, carried on its loan business in Tennessee exactly as it had previously done, and that the loan to Bedford was a part of their general illegal business and not an isolated transaction. Petitioners submit that even if the State of Tennessee could not by the Act of March 26, 1891, require the Eastern Building and Loan Association to deposit securities before making loans to stockholders who had previously applied therefor, that the Act, chapter 95, of 1891, prevented such loans to stockholders who

applied thereafter, when the terms of such Act had not been complied with.

2. In the opinion rendered the Supreme Court of the United States comments upon the case of New York, &c., Building and Loan Association vs. Cannon, 99 Tennessee, 344, and differs from the conclusion arrived at therein by the Supreme Court of Tennessee. It is respectfully submitted that the Supreme Court of Tennessee did not in the Cannon case decide that a stockholder had a vested right to a loan. Such Court merely held that if such stockholder did have such vested right that the Building and Loan Association was still obliged to comply with the State law, before carrying on business. The Supreme Court of Tennessee has never held that a stockholder in a Building and Loan Association had any vested right to a loan from such Association.

See N. Y. &c. B. & L. Association vs. Cannon, 99 Tennessee, 344;

Illinois Building and Loan Association vs. Walker, 42 S. W. Rep., 192;

U. S. Savings and Loan Co. vs. Miller, 47 S.W. Rep., 17.

The Supreme Court of Tennessee has simply held that the stockholder had "only the privilege of applying for a "loan to the amount stated therein, if he should see proper "to do so. That provision did not obligate the company "absolutely to loan the money, but was expressly con- "ditioned upon the fact of there being a sufficient amount

"of money in the treasury, and also upon proper applica-
"tion being made, accompanied with proper security with
the right of the company to pass upon these matters."
(See 42 S. W., Rep. 193.) In that case the Court held the
application for loan was but "the beginning of the nego-
"tiation for that purpose," and further said: "By becom-
"ing a stockholder the defendant, B. F. Walker, had
"merely acquired a status that would enable him to open
"negotiations for a loan. There was no contract between
"him and the company at that time which could be in any
"wise impaired by subsequent regulations prescribed by
"the legislature for the conduct of the company's
"business. We are therefore of the opinion that
"the complainant can base no rights as against
"the statutes upon the stock subscription above
"referred to or by reason of the fact that Walker
"had become a stockholder" Petitioners submit that the facts in the present case are similar to those in the case just cited—that the Eastern Building & Loan Association had absolute power to decline to make any loan and to refuse any security offered and that they could not have been forced to make a loan or to accept security offered therefor. It is respectfully submitted that the Supreme Court of Tennessee did not decide in the Cannon case that a stockholder had a vested right to a loan, but intimated the contrary, holding that even if there had been a vested right the law should have been complied with. It is further submitted that in the present case Bedford had no

fixed or vested right to a loan at any time and certainly prior to his asking for one, March 20, 1891, and that the Supreme Court of the United States in the opinion rendered herein merely differed from the Tennessee Supreme Court in holding that where a vested right to a loan existed such right was impaired by the subsequent State legislation.

3. As hereinbefore set out petititioners ask a rehearing of this cause because the Act, Chapter 95 of 1891 of Tennessee was overlooked by the Court in its opinion and when such act is considered petitioners submit that the result would be different from the conclusion arrived at in such opinion.

Petitioners further ask for a general rehearing of the legal questions involved in this cause. Petitioners do not suppose that the Supreme Court of the United States in its opinion herein meant to hold that the mere fact that a person held stock in the Eastern Building & Loan Association gave him a fixed and vested right to a loan from such association and that such right was impaired by the passage of laws by the Legislature of Tennessee before any attempt to secure such loan was made. If the Court meant to be understood as so holding, then petitioners respectfully ask a rehearing upon the question. It is not a question that involves simply personal rights of petitioners. It is a question that involves the right of the State of Tennessee to fix the terms upon which foreign Building & Loan Associations can do business in Tennessee.

Petitioners respectfully submit that the State had the power to fix the terms upon which the foreign Building & Loan Association could do business in Tennessee, and that such power existed as fully after stock had been sold in Tennessee as before. By selling stock in Tennessee such Association could not acquire the power or right to thereafter transact business in Tennessee and loan money therein, when they had not complied with the laws of the State fixing the terms upon which such business could be so carried on.

Petitioners respectfully submit, as shown fully by the record herein, and by the brief filed on their behalf on the hearing herein, that the Eastern Building and Loan Association, after the passage of the Tennessee laws of 1891, carried on a general loan business in Tennessee without having complied with such laws and that the transaction in question was part of this illegal business.

Petitioners submit that the effect of the decision rendered herein is to hold that the State of Tennessee, after stock had been sold by the Eastern Building and Loan Association in Tennessee, could pass no laws fixing the terms upon which such Association could carry on business in Tennessee and loan money therein.

Petitioners respectfully ask a rehearing upon the point that the selling of stock in Tennessee did not prevent the State from passing the subsequent laws of 1891, being chapters 95, 122 and 2, of that year, and that where

such laws were not complied with, loans made in Tennessee by the Eastern Building and Loan Association were illegal. Petitioners submit that after the passage of such laws the right to make such loans was dependent entirely thereon, and that nothing done by the Association or by the stockholders therein could authorize such loan, where the laws before referred to had been disregarded.

In considering the various questions hereinbefore mentioned and each of them, petitioners call the attention of the Court to the fact that while the application for a loan by H. L. Bedford bears date March 20, 1891, that the same did not leave Tennessee until after May 5, 1891. At that date the appraisers valued the property offered as security for any proposed loan.

Petitioners therefor submit that while the application for a loan bore date March 20th, 1891, that such application cannot be considered as having been made earlier than May 5th, 1891. The application was not in fact received by The Eastern Building & Loan Association until May 12, 1891. See Transcript, pages 63-66-67, and original brief filed on behalf of Bedford and wife upon the hearing at pages 2-6.

When the application was received by the association each and all of the Acts of Tennessee of 1891 had been passed and were in force. Such Acts as petitioners submit not having been complied with by The Eastern Building & Loan Association prevented such association from

doing business in Tennessee and loaning money therein as a part of such business.

Petitioners therefore respectfully pray that an order may be made for a rehearing of the argument in this case on a day to be appointed by the Court at such time and upon such points as the Court may direct.

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Attorney for H. L. Bedford and Lou M. Bedford.

I hereby certify that this petition for a rehearing is presented in good faith, and that I believe it is based on meritorious grounds.

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Attorney for H. L. Bedford and Lou M. Bedford.